

Claimant argues that she has met her burden of proof and that the ALJ's preliminary hearing Order should be affirmed in all respects. Claimant acknowledges the apparent inconsistency within the medical records as it relates to her work history, but claims she did nothing to mislead the physicians with respect to her work history. She maintains that her present need for treatment relates back to her original shoulder injury from August 2002 for which respondent voluntarily provided treatment. Her course of care was interrupted by pregnancy and complications that followed. When she returned to work at her normal duties, the pain immediately returned and now requires additional treatment. Thus, the ALJ's Order should be upheld.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

In August 2002, claimant began experiencing problems in her right shoulder, including burning and pinching pain. Respondent provided treatment with Dr. Donald T. Mead who diagnosed right trapezius strain. His treatment suggestions were limited because claimant was pregnant at the time. She was directed to ice her injury, directed to physical therapy and given work restrictions. Claimant returned for follow up visits up to September 19, 2002.

Claimant apparently returned to work until December 19, 2002 when she had to cease working due to pregnancy complications. Claimant was off work until April 25, 2003 when she then returned to her regular work duties. During this period claimant was apparently having physical therapy but her problems continued. She contacted the safety office and advised them of her lack of improvement. Then, on October 27, 2003, claimant took medical leave as she was suffering from post-partum depression.

Although she was not working, her shoulder pain did not improve. Claimant testified she contacted her employer even while off work and advised them of her problems.

Claimant returned to work on December 3, 2003. She worked one day at her regular duty and the next, she reported to her employer of the recurring pain in her right shoulder. She was again referred to Dr. Mead. He saw her on December 4, 2003. At that time, she complained of an increase in her shoulder symptoms and related a history of ongoing discomfort for the past year.

Curiously, Dr. Mead's records indicate claimant told him she had been working regular duty, full time, for the past month when in reality, claimant had worked one day. Dr. Mead apparently had some input about her work history from an outside source as he refers to a phone call from the employer and the respondent's contention that claimant had worked for just one day. Dr. Mead recommended limited duties along with an orthopaedic evaluation. This recommendation was, however, qualified. He indicated that "[i]f she did

not tell me the truth about her work status, her employer will need to terminate if they wish to proceed with treatment. I do not recommend continued treatment if she was not truthful with me regarding her work status.”³

Based upon Dr. Mead’s records, respondent refused all further benefits. On December 5, 2003 respondent suspended claimant from work for what it believed were misstatements to Dr. Mead.

Claimant proceeded to seek treatment with Dr. John H. Gilbert. Dr. Gilbert diagnosed rotator cuff tendinitis/impingement in the right shoulder. He recommended physical therapy and provided injections in the hopes of decreasing her pain complaints. She was placed on light duty for a period of time and on March 11, 2004, she was released to full duty.

Following the preliminary hearing, the ALJ granted claimant’s request for treatment and temporary total disability benefits as he concluded claimant aggravated her shoulder on the one day she worked for respondent. Respondent strenuously contends the ALJ erred in granting benefits. Respondent bases its argument on claimant’s misstatements to Dr. Mead about her work history and “it is simply not credible for claimant to assert injury due to overuse one day after returning to work following an extended leave of absence.”⁴

After considering respondent’s argument and reviewing the evidence offered by the parties, the Board concludes there is no reason to disturb the ALJ’s findings.

It is clear from the record that claimant has suffered ongoing right shoulder complaints since August 2002. Her pregnancy prevented any meaningful treatment and it is therefore logical that the complaints continued. After she delivered her child, she had some improvement with the physical therapy. Her return to work obviously aggravated that condition and the fact that it was but one day of work is not problematic given her ongoing complaints of pain. The inconsistency in Dr. Mead’s records is, likewise, not wholly troublesome as it is clear that the respondent had already been in contact with him asserting that she could not possibly have been hurt by one day’s work.

The medical records, when taken as a whole, substantiate claimant’s claim for benefits. She sustained an injury beginning in August 2002 and those complaints have yet to resolve. Claimant’s pregnancy and resulting complications intervened thereby preventing treatment and, a resolution to those complaints. She has not returned to work and the complaints have intensified. The ALJ concluded claimant aggravated her shoulder when she returned to work on December 4, 2003 and the Board agrees with that finding.

³ P.H. Trans., Resp. Ex. A at 32.

⁴ Respondent’s Brief at 7 (filed May 17, 2004).

Claimant is entitled to the benefits she seeks and therefore, the ALJ's Order is affirmed in all respects.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.⁵

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated April 28, 2004, is affirmed, except as to the date of accident which is found to be December 4, 2003.

IT IS SO ORDERED.

Dated this _____ day of June 2004.

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
D'Ambra M. Howard, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁵ K.S.A. 44-534a(a)(2).